No. 12,969

IN THE

United States Court of Appeals

For the Ninth Circuit

HARRY SIMMONDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the District Court of the United States, for the Northern District of California, Northern Division, condemning and fixing the value of certain property in the County of Yolo, State of California.

Jurisdiction in the District Court was claimed under Section 591, Title 33, U.S.C., and Section 257, Title 40, U. S. Code.

Jurisdiction of this Court is conferred by Title 28. U.S.C., Section 1291 (Act of June 25, 1948, C. 646, Section 1, 62 Stats. 929).

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division, Honorable Dal Lemmon presiding, entered after verdict of a jury, and after judgment by the Court on certain matters submitted to it for its decision. (See Tr. of Rec. p. 96, Notice of Appeal.)

The action was commenced by the United States Government to condemn certain lands in Yolo County, California, property of the appellant herein. The issues joined for trial were:

1. The necessity or right of the Government to condemn the fee to the real property in question;

2. The number of acres of land owned by the appellant; and

3. The value of the property.

The only issue submitted to the jury was the value of the property, *per acre* (see Rep. Tr. p. 417), the Court reserving to itself the questions as to the number of acres belonging to appellant and the necessity and right of the Government to condemn the property.

The jury found the value of the property, as of the date of taking, which date was stipulated to between counsel (Tr. of Rec. p. 69) to be $375.00 per acre. The Court, on November 22, 1950, found that

the property condemned consists of 18.27 acres, and "against (appellant) upon other issues submitted * * * for decision." (Tr. of Rec. p. 70.) Thereafter, and on the 14th day of December, 1950, judgment, containing findings of fact and conclusions of law, was lodged by the Court. (See Tr. of Rec. p. 74.) Appellant, on the 22nd day of December, 1950, filed his motion for a new trial, which motion after hearing by the Court, was denied. (Tr. of Rec. pp. 91, 94.)

FACTS.

Appellant purchased the real property in question on October 21, 1944. (Rep. Tr. p. 64.)

Shortly thereafter, and in early 1945, the Government of the United States, prior to the institution of any condemnation proceedings, entered upon the lands and commenced cutting down some 12,000 trees and dumping sand and silt from the Sacramento River, which river flows adjacent to the property in question. (See Rep. Tr. p. 59.)

On August 5, 1947, some two years after the initial trespass, the Government of the United States commenced the present proceeding by filing a complaint in condemnation, seeking to condemn this land and certain other lands adjacent thereto. (The property herein involved was designated at that time as Tract No. 7.) *The Government in its original complaint sought only a right or easement for a period of fifteen*

years for the purpose of depositing thereon spoil and other material excavated in the improvement and maintenance of the Sacramento River.

It should be noted that in the same complaint, the Government (appellee herein) sought an easement or right on land adjacent to that of the appellant for a period of *five years only.* That tract, designated as Tract No. 8 in the same complaint, lies immediately north of that belonging to appellant and is described as consisting of 14.388 acres, more or less, or roughly the same acreage as that alleged to belong to appellant herein. (See Tr. of Rec. p. 2.)

The complaint alleged, upon information and belief, that the lands taken were not part of a larger tract belonging to the purported owners, and described appellant's property as consisting of 16.92 acres, more or less.

At the time of the filing of the original complaint in condemnation, to wit, on or about August 11, 1947, no declaration of taking was filed, nor any judgment of the Court on the declaration of taking was sought; nor was any estimate of just compensation made by the appellee; nor any deposit of money made with the registry of the Court. None of these things were done until approximately one year later, to wit, on or about the 12th day of August, 1948. (Tr. of Rec. pp. 29-36.)

Thereafter and on *January 16, 1948,* prior to any pleading by appellant, appellee filed an amendment

to complaint, seeking a right of easement on appellant's property, *retroactive to June 15, 1943,* thus antedating the original trespass. (See Tr. of Rec. p. 10.)

On March 1, 1948, appellant filed his answer to appellee's amended complaint. (Tr. of Rec. pp. 13 et seq.)

On August 11, 1948, appellee filed its second amendment to complaint, changing the description of the property and alleging that the said property consisted of only 13.308 acres, more or less. (Tr. of Rec. p. 24.)

On or about August 12, 1948, appellee filed a "Declaration of Taking," signed by the Secretary of the Army, setting forth the public use to which the lands sought to be condemned were to be put, and an estimate of just compensation for the value of the purported fifteen-year easement for Tract No. 7. The Court, upon *ex parte* application of appellee, entered its judgment, vesting in appellee a right and easement for fifteen years, commencing June 15, 1943, deeming the land taken by appellee as necessary and suited to the use, and that just compensation for the taking to be ascertained and awarded by judgment. (Tr. of Rec. p. 33.)

Thereafter, and on October 20, 1948, appellee Government filed notice of motion for leave to file its third amendment to complaint, proposing to amend its complaint to allege condemnation of the land in fee simple. (Tr. of Rec. p. 37.)

On October 29, 1948, appellant filed written objections to the filing of the proposed third amendment to complaint, basing his objections on the ground that appellee's proposed amendment to complaint did not show the necessity for the taking of appellant's property in *fee simple*. (Tr. of Rec. p. 43.)

The Court made its order allowing the third amended complaint to be filed, and pursuant thereto, on the 17th day of December, 1948, appellee filed an amendment to the declaration of taking. Thereafter and on the 22nd day of January, the District Court entered an amendment to the judgment on declaration of taking. (See Tr. of Rec. p. 49.)

On March 9, 1949, appellant filed his answer to appellee's third amendment to complaint, alleging, *inter alia,* that it was unnecessary for appellee to condemn the fee simple to appellant's property for the use and purposes alleged by appellee, and that the taking of the fee was therefore in violation of the Fifth Amendment to the Constitution. (Tr. of Rec. p. 49.)

On or about April 25, 1950, appellee filed its fourth amendment to complaint, alleging the taking of additional property belonging to the appellant, designated therein as Tract No. 7, Parcel 2 (Tr. of Rec. p. 56), and thereafter filed Declaration No. 2 (Tr. of Rec. p. 61), setting forth the estimated just compensation for the additional tract.

On or about September 22, 1950, appellant filed his answer to the fourth amendment to complaint, alleg-

ing, *inter alia,* that it is unnecessary for appellee to condemn the fee of appellant's land for the purposes set forth in appellee's complaint, and that the taking of the fee thereof constituted a denial of due process of law. (Tr. of Rec. p. 64.)

Prior to trial, a stipulation was entered into between the parties, stipulating that the fair market value of the property shall be determined as of November 8, 1948, and that the property shall be valued in its physical condition as it existed on October 21, 1944 (Tr. of Rec. p. 67), prior to the date of the trespass of the Government.

The property herein involved is a tract of land lying directly across the Sacramento River from the Capitol of the State of California, within a mile of the State Capitol Buildings, and one-quarter mile from a bridge known as the I Street Bridge, which bridge extends from the center of the population of the City of Sacramento. (See Defendant's Exhibits A, B and C.) The Court found that the property consisted of 18.27 acres (see Tr. of Rec. p. 70), although the appellant claimed that it consisted of an additional 3.6 acres. (See Rep. Tr. pp. 3, 52.) Except for a small house built thereon, the land is unimproved property. However, its physical condition as it existed in 1944 (stipulated to as the date the jury should consider its physical condition), the property had the appearance of a natural park, consisting of large wooded areas containing large trees. (Rep. Tr. p. 31.) Appellant testified that approximately 20,000 trees were cut down by appellee government after he

had purchased the property. (Rep. Tr. pp. 57-58.) The property was easily accessible by means of a county road that ran along the entire western boundary of the property. (Rep. Tr. p. 16.)

SPECIFICATION OF ERRORS.

1. The Court erred in finding that it was necessary for appellee to condemn the fee to the property involved.

2. The evidence does not support the jury's verdict as to the value of the property.

3. The evidence does not support the Court's finding that the property consisted of 18.27 acres.

I.

THE APPELLEE DID NOT SHOW, EITHER BY PLEADING OR PROOF, THE NECESSITY OR AUTHORITY TO CONDEMN APPELLANT'S FEE.

It is submitted that the Court erred in allowing appelee to condemn appellant's fee in this matter, since appellee did not allege, nor prove, the necessity or authority, to take the fee.

A. The pleadings.

1. This action was commenced by a complaint (see Tr. of Rec. pp. 1-8) in condemnation, filed August 5, 1947. The complaint alleged (paragraph VII) that the land described "has been selected * * * for use in

connection with the improvement of the channel of the Sacramento River, California, and is sought to be taken and condemned for said purpose and use and is suitable and necessary therefor;" and (paragraph III) that the acquisition of the said lands by plaintiff will be of the greatest public benefit and least private injury; and (paragraph II) that the estate or interest sought is *"the right and easement for a period of fifteen years,* to deposit on the land * * * any and all spoil and other matter excavated in the improvement and maintenance of the Sacramento River Improvement Project * * *"

The complaint cited as authority for the taking Section 591, Title 33, U. S. Code, and the Rivers and Harbors Act of 1935, as amended by Act of July 24, 1946. (49 Stats. Ch. 831 and 60 Stats. Ch. 596.)

2. Thereafter appellee filed a declaration of taking (Tr. of Rec. pp. 29-31) signed by Kenneth C. Royall, Secretary of the Army, dated May 19, 1948, which declaration averred, *inter alia* "(b) The public use for which said lands are taken are as follows: 'That said lands are necessary for the deposit of spoil for the Sacramento Improvement and Navigation Project * * *' and '3. The Estate taken for such public use is the right and easement to deposit on said lands * * * any and all spoils and other matters excavated * * * *for a period of 15 years commencing* June 15, 1943.' " (Our emphasis.)

3. Pursuant to said declaration and on August 12, 1948 (Tr. of Rec. pp. 33-36) and upon *ex parte* appli-

cation, the Court entered judgment for appellee, *granting to the United States Government an easement for a period of fifteen years commencing* June 15, 1943, for the sole purpose of dumping spoil and other matter excavated from the Sacramento River, and finding "that the said lands are deemed to have been taken and condemned for the public use * * * as authorized by law and *are necessary and suited to said use.*"

4. Thereafter, and on October 20, 1948, appellee served appellant with a notice of motion for leave to file its third amendment to complaint (Tr. of Rec. p. 37), and attached thereto its proposed amendment (Tr. of Rec. p. 38), which amendment to complaint sought to amend *only* paragraph II of its original complaint, and to condemn the *fee* to appellant's property.

It should be noted here that no new facts were alleged showing the necessity or the authority to take the fee; nor were any amendments to the complaint proposed to change the allegations of Paragraph III (alleging the public interest and least private injury) or Paragraph VII (alleging the suitability of the land for the purposes and use and its necessity).

5. Appellant on October 29, 1948 (Tr. of Rec. p. 43) filed his objections to the allowance of the amendment, on the ground that appellee did not show the necessity of taking appellant's fee for the purposes alleged in the complaint, to wit, the dumping of spoil from the Sacramento River.

6. Notwithstanding appellant's objection, the Court made its order allowing the amendment to the complaint to be filed, and on November 8, 1948 appellee duly filed its amendment. (Tr. of Rec. p. 44.)

7. Pursuant to the filing of the amendment to complaint and order of Court dated January 22, 1949 (Tr. of Rec. p. 46) appellee filed an amendment to declaration of taking, which amendment merely increased the sum of money to be deposited for the taking but *did not set forth any additional reasons for the increased estate, nor show the necessity or authority for the taking of the fee in place of the easement previously taken.*

8. The Court, on *ex parte* motion, and on the 22nd day of January, 1949, entered an amended judgment of declaration of taking, changing the sum deposited with the registry of the Court.

9. Thereafter and on March 9, 1949, appellant filed his answer to the amendment to the complaint, alleging, *inter alia* (see Tr. of Rec. p. 50) that it is unnecessary for appellee to condemn appellant's fee for the purposes and use for which the property was sought to be condemned.

B. Proof and findings.

It is submitted that no evidence was adduced by appellee to show that more than an easement was necessary for the purposes and use to which appellee allegedly sought to condemn the property; nor was any evidence introduced showing that the condemning au-

thority ever made a determination of the necessity thereof.

1. At trial, commencing October 24, 1950, a conference in the Court's chambers was held to determine the procedure of trial, where it was determined that the only question to be given to the jury for its verdict was the value of the property, the Court reserving to itself the other questions raised by the pleadings, to wit (1) the amount and extent of the land owned by the appellant, and (2) the necessity for appellee to condemn the fee title to appellant's property for the purposes set forth in the complaint and amendments thereto. (See judgment as to Tract 7 and to Tract 7, parcel 2, Tr. of Rec. pp. 74-83, particularly p. 75, lines 17-23.)

2. The only evidence, as shown by the record, adduced by either party was contained in several exhibits, particularly plaintiff's exhibits 12, 13, 14, and 15, which were admitted without appellant's objection.

Exhibits 13 and 15 deal with the subject of the increase in the estate from an easement to that of the taking of the fee.

Exhibit 15 is the only evidence showing the authority of the Attorney General to amend its complaint to take the fee. A careful examination of that exhibit will conclusively *demonstrate that no finding is made by the Secretary of War as to the necessity of having the fee.* No change of circumstance is shown why the

fifteen-year easement would not satisfy the Government's needs, *or that the same is necessary for the public use.* The letter merely states: *"It has been determined to be advisable* to change the estate taken * * * from easements to the fee title." (Our emphasis.)

But *why?* Is private property to be taken merely because some administrative officer believed it "advisable" that it be taken?

3. The Court in its findings (Finding No. VI, Tr. of Rec. p. 80) finds:

> "That it was and is necessary for the plaintiff to condemn the fee title of the defendant Harry Simmonds' property subject to this Final Judgment for the purposes set forth in the plaintiff's complaint and amendments thereto."

If it was deemed necessary by the Court and appellee to make a finding that it was necessary for appellee to have the fee title for the purpose of dumping spoil from the Sacramento River on appellant's land, then it was incumbent for appellee to plead and prove this necessity—a finding must have some evidence to support it. Here, there is *no* evidence of necessity—only a statement to the effect that "it is deemed advisable" to take the fee. *But one may not equate advisability with necessity.*

It is therefore submitted that no evidence of need for the fee is shown, and the finding of the Court as to such necessity is without evidentiary support.

C. The law.

1. The practice, pleadings and forms and modes of procedure of the Courts of the State in which the real property is situated applies in condemnation proceedings instituted in Federal District Courts.

Title 40 *U. S. Code,* Section 258;

Title 33, *U. S. Code,* Section 591.

2. It is submitted that the law is clear that the Government may not condemn more property nor a greater estate therein than is needed for the purposes and use for which it seeks to condemn private property.

a. A comprehensive statement of the rule is found in 10 R.C.L. at page 88, where the text writer states:

> "Inasmuch as property cannot be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which shall be required to pay for more than it needs."

Also cited in 79 A.L.R. 516, 68 A.L.R. 837, and 18 Am. Jur. 741.

b. It has been held time and time again that no more property of a private individual, nor greater

interest therein, can be condemned and set apart for public use than is absolutely necessary.

Young v. Gurdon, 169 Ark. 399, 275 S.W. 890;
Curtis v. Boston, 247 Mass. 417, 142 N.E. 95;
Seattle v. Faussett, 212 Pac. 1085.

3. The appellee should have alleged and proved the necessity and right to take appellant's fee simple title.

a. There is nothing in the statutes under which appellee proceeded that gave it the authority to take the fee, when the easement would suffice.

Appellee in his complaint relied upon the following statutes for its authority to proceed at all:

Public Law 409 (49 Stats. Ch. 831, p. 1028) (commonly known as the Rivers and Harbors Act), adopted August 30, 1935, as revised by Public Law 526 (60 Stats. Ch. 596) adopted July 24, 1946.

An examination of these statutes reveal that they are general statutes, authorizing improvements to many rivers and harbors, including the Sacramento River.

Title 33, Section 591, U. S. Code, is a general statute providing that the Secretary of War may institute proceedings for the acquisition of any "land, right of way, or material needed" in the improvement of rivers and harbors.

Appellee also cites Section 257 and 258a of Title 40, but neither of these sections adds anything to the authority of the Secretary of War.

It can reasonably be concluded that the Attorney General had the power to proceed to condemn appellant's land *after a determination* of the Secretary of War that the same was necessary to accomplish the purposes and use to which it was to be put.

In discussing these Acts, the Court (C.C.A., 7th Cir.) in *United States v. Meyer,* 113 F. (2d) 387, specifically held that the Secretary of War is authorized to acquire the fee simple title *when deemed necessary.*

Appellant is not unmindful of the holding that "the power to decide whether such a title is needed is, by the legislation, conferred upon the Secretary, and in the absence of bad faith or abuse of discretion, such determination is not subject to judicial review." (*U.S. v. Meyer, supra,* and cases therein cited.)

See also:

People v. Olsen, 109 Cal. App. 523;
People v. Milton, 35 Cal. App. (2d) 549.

But, the point in this case is that no such determination had been made by the Secretary of War. At least, neither the pleadings nor the evidence show that the Secretary of War deemed is necessary that the fee be taken for the purposes for which the property was condemned.

It is obvious that *an easement* is sufficient for the purposes and use for which the land was sought to be

condemned. The stated purpose is to dump spoils from the Sacramento River. When the land is completely filled in, then what is the Government to do with the property? Under the provisions of the Rivers and Harbors Act of 1935 (Section 7), the Secretary of War is authorized to sell land no longer needed or serviceable. Is it the thought of the Government that the property will be condemned, filled with the spoil, and then sold to private persons?

The fact that originally the Government sought *only* an easement is proof that that would suffice for its needs. To amend its complaint and seek the fee, merely because "it is deemed advisable" is *not* a showing of need, necessity, or that the public interest will best be served. Certainly, an easement was deemed sufficient for all of the neighboring properties.

4. The *burden of proof* as to necessity is upon the condemnor to show that the use to which he seeks to appropriate land is a public one.

California Code of Civil Procedure, Section 1241;

10 *Cal. Jur.* 407;

Madera Railway Co. v. Raymond Granite Co., 3 Cal. App. 668.

The condemnor must plead the right of the plaintiff to take the property and the purpose of the taking. (Calif. C.C.P., Sec. 1244.) Where there is pleading or evidence that the Legislature or the authority to which it has delegated the power, has actually determined the necessity and public use, the burden of

showing fraud, or abuse of discretion, is on the condemnee.

Thus, in *United States v. Meyer,* supra, the Secretary of War had made a determination that the fee was necessary for the improvement of the Mississippi River, under the authority of the Rivers and Harbors Act of 1935 and 33 U. S. Code, paragraph 591 (the same acts under discussion herein), and the Court holds that such determination is final in the absence of bad faith or abuse of discretion.

In the case at bar there was no determination by the Secretary of Army that anything but an easement was necessary.

In *People v. Milton* (35 Cal. App. (2d) 549), the pleadings and exhibits offered at trial made out a *prima facie* case of the right of eminent domain by showing a resolution of the Department of Public Works declaring that the public interest and necessity required the taking of the property, and the Court holds that the issue of excessive taking is one for judicial determination, but that the issue must be properly raised by pleadings, and the condemnee must show bad faith or abuse of discretion.

In *Montebellow etc. School District v. Keay* (55 Cal. App. (2d) 839), the condemnor School District had made a finding of the need for a particular site. The Court again held such finding conclusive and that the burden of proof, after the question is properly raised by pleading, to show the contrary is on the condemnee.

See, also,

People v. Broome, 120 Cal. App. 267.

The thread running through all these cases is that the condemning authority, e.g., the Secretary of War, Department of Public Works, or the School District, had made a finding or determination as to the public interest or necessity of acquiring the property sought to be condemned, or the estate therein, by proper pleading and proof, a *prima facie* case of necessity and public interest had been made.

In the instant case, *no such determination is shown.* The pleadings show the necessity *only* for a fifteen-year easement. The evidence shows only that "it is deemed advisable." The appellant had by proper pleading *denied* the public interest and necessity.

In such circumstances, the burden of proof was on the condemnor to make out at least a *prima facie* case of public interest and necessity to be served by taking the fee rather than the easement before the condemnee should be forced to come forward with evidence to show bad faith or abuse of discretion. Appellant could not present such evidence unless and until the appellee had shown the *use of the discretion* vested in it by Congress, *rather than the absence thereof.*

The appellee having failed to show, either by pleading or proof, the public interest or the necessity of taking the fee rather than the easement, it is submitted that the judgment must be reversed and the matter remanded for a new trial.

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT AS TO VALUE.

A. The Court erred in admitting evidence of the price appellant paid for the property.

1. The general rule is that it is competent, as evidence of market value to show the price at which property was bought, if *not* so remote in time as to have no bearing on the question of present value.

18 *Am. Jur.* 994.

2. The evidence herein was that the appellant purchased the property in 1944, and the date of valuation was 1948. In view of the change in market conditions between the years 1944 and 1948, it is submitted that appellant's objection to the question as to the purchase price in 1944 should have been sustained. (Rep. Tr. p. 64.) See, also, testimony of expert witness for appellant, Hulting, stating that the purchase price was too remote and the value was greater in 1948 than at the time of the purchase in 1944.

(Rep. Tr. pp. 201-202.)

3. While standing alone, the erroneous admission of this evidence may not be considered reversible error. Yet, as will presently appear, it became reversible and prejudicial because of the fact that the Government witnesses relied upon this fact as a primary basis for their opinions as to market value in 1948.

B. The evidence.

1. It is the contention of the appellant herein that no credible evidence of value was presented by appellee and that therefore the jury's verdict of value, to wit, $375 per acre, was not supported by the evidence.

The appellee produced two experts, the first of whom was Chris R. Jones, who was totally discredited by the appellant on cross-examination.

(a) Chris R. Jones is a real estate appraiser of many years' standing, member of the National Real Estate Board, California Real Estate Association, Sacramento Real Estate Board, and the American Institute of Real Estate Appraisers. At the time of trial, he was a California State Inheritance Tax Appraiser and had been such for over fifteen years. He had been active in the appraisement of real property for over twenty-five years, having been engaged by city, State, or various branches of the Federal Government including the Department of Justice, Army, and Housing. (Rep. Tr. pp. 221-223.) His qualifications as an appraiser were not questioned by appellant. His appraisal in this case, however, is questioned, as more fully appears herein.

On direct examination, after a considerable amount of testimony as to what the expert took into consideration in fixing the value, he testified as follows:

> "Q. (by Mr. Dill). * * * did you arrive at an opinion as to what was the fair market value

* * * as of November 8, 1948, taking into consideration its physical condition in October of 1944?

A. I did.

Q. And what was that?

A. Sixty-five hundred dollars.

Q. Do you know how much that is an acre, on an acreage basis.

A. Approximately *three hundred dollars* an acre, allowing a thousand dollars for the little house."

(Rep. Tr. pp. 233-234.) (Our emphasis.)

But on cross-examination:

"Q. (by Mr. Garry). When did you go on the property the first time?

A. * * * I think it was the latter part of 1945."

(Rep. Tr. p. 246.)

"Q. Did you evaluate the property at that time?

A. Yes I did."

(Rep. Tr. p. 247.)

* * * * * * *

"A. I valued it at $4,500."

(Rep. Tr. p. 249.)

* * * * * * *

"A. That is for the purpose of fill.

Q. In other words, you evaluated this entire area at $4,500, just for the purpose of fill?

A. That is right, and Mr. Simmonds was to retain the fee.

* * * * * * *

Q. Now at that time, how many acres were you told were on this property?

A. Eighteen point two two * * *.

* * * * * * *

Q. Is not it a fact, Mr. Jones, that at that time you were told by the United States Government that the property was only thirteen—thirteen point acres?

A. Yes, that is right. * * *

Q. Then the evaluation that you placed on the property in 1945 was on the basis of thirteen acres and it was also on the basis of just use for fifteen years and not taking the fee, is that correct?

A. That is right."

(Rep. Tr. p. 250.)

* * * * * * *

"Q. How did you arrive at that figure at that time?"

(Rep. Tr. p. 250.)

"A. I arrived at it in this way. *I knew what Mr. Simmonds had paid for the property.* I knew of the tremendous increase in value that arose out of the property being filled—other property being filled, and I knew that he would be deprived the use of it for fifteen years, but at the end of fifteen years he would have a fill there which if he had had to do at the time himself would cost several hundred thousand dollars, so it was my judgment that in view of the fact they were taking the property away from him for fifteen years, he is to be given what he paid for it. I think I was liberal, but I figured he should be given what he paid for it so at the end of fifteen years, he

would have a very valuable piece of property. That was my line of reasoning. (Our emphasis.)

"Q. In other words, you figured that the use of this property for a period of fifteen years was worth better than $350 per acre.

A. Well, whatever it figured out to."

(Rep Tr. p. 251.)

* * * * * * *

"Q. How do you account for evaluating this property at sixty-five hundred dollars when you had already evaluated just the easement for forty-five hundred dollars based on thirteen acres? How do you account for that?

* * * * * * *

A. Well, I attempted to explain to you before the taking of the property for fifteen years and filling it, deprived the owner certainly of the use of the property for fifteen years, but for that use he was getting substantially some benefit. Now, if you take the property as it is and just take the property-physical condition that it is and take the fee to it for the reasons I have discussed heretofore, I think that the reasonable market value of it is sixty-five hundred dollars.

Q. It is your testimony then, Mr. Jones, that when the government is taking the fee, taking everything away from this particular defendant, Mr. Simmonds, where he doesn't get the property back at all, that you figure that the property is worthy sixty-five hundred dollars for eighteen point two seven acres, but when the government only takes it for fifteen years and in addition piles sand on there, which in your opinion, improves the property, for thirteen point three oh

eight acres, that that property is worth forty-five hundred dollars?

A. That is right."

(Rep. Tr. pp. 258-259.)

What are we to conclude from the evidence of this witness? He testifies that for thirteen acres, the use of the property for a fifteen-year period is worth about $4,500, or approximately $345 per acre. The reason for this valuation (Rep. Tr. p. 232) is that at the end of fifteen years, appellant would receive back a very valuable piece of property that would have cost him two hundred thousand dollars to fill. (See Rep. Tr. p. 269.) In other words, the witness is saying that if the Government takes only a fifteen-year easement, the appellant should be paid $204,500; i.e., $4,500 for the use of thirteen acres of property, together with fill valued at $200,000. (500,000 cubic yards at forty cents per cubic yard. See Rep. Tr. p. 269.)

(b) The other expert produced by appellee was William M. Thielbar. At the time he made the appraisal of the property herein, he was employed by the United States Corps of Army Engineers (Rep. Tr. p. 296) as an appraiser. Subsequently, he was employed as an appraiser by the Hancock Insurance Company.

It is contended herein that Mr. Thielbar made no independent appraisal but relied only on the contract of sale by which appellant acquired the property and on appraisements made by others. Thus:

"Q. Yes, in August of 1948?

A. That is true.

Q. Because you had just gone to work there in July of 1948?

A. That's right; that's right.

Q. And yet you proceeded to agree with the $4500 appraisement, without any consideration of any of the other properties, the ones we are discussing now, did you not?

A. On the basis of the foundation of comparable sales, yes, I did.

Q. You did examine some comparable sales before you arrived at the fact that the $4500 was a fair value of this property?

A. Yes.

Q. On August of 1948?

A. That's right.

Q. When did you do it?

A. When I read the contract between Mr. Simmonds and Mr. Hoagland.

Q. Oh, you——

A. What better comparable sale is there?''

(Rep. Tr. p. 267 [see also Rep. Tr. p. 306].)

''Q. Oh, that is the only basis that you used, is that correct?

A. Not entirely.

Q. What other basis did you use, Mr. Thielbar?

A. I used my own mind and opinion.''

(Rep. Tr. p. 368.)

Without setting forth at length all of Mr. Thielbar's testimony, an examination shows that in making this evaluation, he relied only on *that sale* and information he found in the file of his predecessor, a Government employee. We believe it a fair statement of the record to conclude that in fact Mr. Thiel-

bar made no independent appraisement but was merely repeating on the witness stand appraisements made by others, and sought only to corroborate the discredited Mr. Jones.

2. Appellant produced two expert witnesses.

(a) The first was Kenneth B. King, who testified that he had had twelve years' experience in real estate transactions in the Sacramento area, and was an appraiser for the California Highway Commission. (Rep. Tr. pp. 129-130.)

He valued the property at $3,500 per acre (Rep. Tr. p. 131), without taking into consideration the value of the soil. (Rep. Tr. p. 132.) For the basis of his reasoning, he gave the following testimony:

> "A. Well, to go back to make a study of it, the property has at least a 1,000 foot frontage on the river, probably the only property where you have access to the river. There is nothing along the river where you can get that amount of land as close to the town as that. There are locations along there which I have talked to different companies who have them for sale, so that is why I have arrived at that figure. As you go by the Tower Bridge or the M Street Bridge, as you call it, you will notice to the right of it the West Sacramento Land Company and Eugene Williams have it for sale * * *"
>
> (Rep. Tr. p. 132.)

> "A. This property, absolutely, when you deal with a corporation or you deal with a private enterprise, they want to get as close to town as they can possibly get and they will pay the price if they can get it, especially when you can get

river frontage. They want that. You can buy land out in here or land out in there without river frontage for practically—well, dirt cheap, but when you come up to buy close to the river, it is valuable (indicating). When you have access to the river, that means something. There isn't a place along the road that I can tell you where you can get permission from the reclamation board or the engineers—you can't have a plant close to a turn in the river, they won't allow it because they are afraid that it will either be hit by a barge or something will break loose, so you have to get in a section where you are free from that, such as where the Shell Oil is * * *"

(Rep. Tr. p. 134.)

"A. You can make it any depth you want. The frontage is what they are after. That is 208 feet.

You take the Ballard property, it was sold in 1948 and 1947, it is on the river frontage. In 1946 a portion of that was sold, it was fifty feet for $5,000.00. In 1947 one hundred feet more was sold for $10,000.00, which makes $15,000 for 150 feet.

If you value 150 feet which is improved property by the acre at 71/100ths of an acre, and you take the acreage in it, it would be $20,000—it would be around $26,000 an acre. Anyway, that is just about what the figure is.

* * *"

(Rep. Tr. p. 135.)

"Q. In other words, Mr. King, your analysis and evaluation of this property is based on the fact that it is on a comparatively straight line of river?

A. That is right.

Q. Without any curves or without any impediment?

A. That is right.

Q. So it can be used for an industrial site, is that right?

A. Yes. I talked to the Reclamation Board and I talked to Mr. Mellin, and Mr. Mellin told me that all I had to do was bring an application to the Board and that the Reclamation Board has full authority clear to the water's edge and from then on, if there is any building going on it is up to the U. S. Army Engineers."

(Rep. Tr. p. 137.)

(b) The other expert was Burt Hulting, who testified that he was by profession a real estate broker, salesman, loan broker and real estate appraiser. He was a member of the San Francisco Real Estate Board, First Vice President of the California Real Estate Association, member of the American Institute of Real Estate Appraisers, past president and member of the Governing Council of the American Right-of-Way Association, and member of the Society of Residential Appraisers. (Rep. Tr. pp. 181-182.)

He testified that he had been an appraiser for twenty-one years, had done appraisals for the State of California and the Federal Government in condemnation proceedings, and had made appraisals and appeared in Court for the same counsel who were handling the case for the Government in this proceeding. (Rep. Tr. p. 182.)

As to value he testified as follows:

"A. My opinion of the value of the land is eighteen hundred dollars per acre, and as far as the house that was in existence there, my opinion of its present worth as of November of 1948 is two thousand dollars.

Q. Two thousand dollars?

A. Yes.

Q. Now, what is the basis for the value that you have appraised the property at eighteen hundred dollars an acre?

A. Well, first of all, I took into consideration the property itself. I made a rather thorough investigation of it sometime ago, going over practically all parts of it. I found that part of it came along the levee, along the levee side north of James Street, and there was a low spot immediately by the levee and a higher spot toward the river, somewhat as depicted by that relief map. I took into consideration its topography and what was on it at that time.

Q. Anything else?

A. And I took into consideration its location. It is located on the river almost across from the City of Sacramento. I took into consideration its location from the standpoint of its being accessible to Sacramento and its proximity to the City of Sacramento and all of the development that is taking place on the Yolo County side of the River, and I took into consideration its surroundings, the City of Sacramento and the immediate surroundings, the filling that's being going on up above, the commercial enterprise there, the Showboat Cafe that is up river from the property and the

development of the river down the river between the bridges and so forth and beyond, and the general surroundings of the property.

The development down between the two bridges, the development there for the use of boats and yacht harbors and so forth, I took into consideration.

Q. When you speak of the development between the two bridges, you are talking about the M Street Bridge and the I Street Bridge?

A. Yes. I took into consideration the possibilities of flood—this property lying outside the levee, I took into consideration the possibility of flood, considered the fact that the flood control on the river has been pretty well in hand for a great many years due to the Yolo Basin and so forth.

I took into consideration the highest and best use to which I thought the property could be put and it seemed to me in my experience that there were a number of uses that property could be put to. It could be developed along the levee in a residential way, apartment or motel or so forth. It could be developed with possibilities for boat, yacht harbor, or fishing or something of that nature.

In its location it is a type of property that in my experience, I have seen pretty large incomes developed from—even probable recreational center, a dance hall of the type and appearance that people of low income or even drive-in theaters. I mean, there are a number of uses, and then on top of that, it wouldn't take a great deal of expenditure to probably develop it for industrial

use of some type, oil company's bulk plant, or something of that nature.

So, the highest and best use in my opinion was commercial. It could be developed in several ways along that line. So I took that into consideration in arriving at my opinion of value.

Now, I took into consideration the sales of some properties that are somewhat similar, nearly similar, in the general area. Some of these properties were superior properties, but here was a basis for comparison. There was one property there between the two bridges occupied by the Sacramento Yacht and Boat Company, so-called Ballard property, which was a smaller property, which was a little more than an acre, which was sold for some fifteen thousand dollars an acre."

(Rep. Tr. pp. 184-186.)

(3) Appellants are cognizant of the rule of law that the jury is not bound by the testimony of experts but may form their independent judgment as to the market value of the property in a condemnation proceeding. Yet, since the jury found the value to be $375 per acre, which sum approximately coincides with that of the Government witness, it is indicative of the fact that the jury used the same fallacious bases for their valuation as that used by the Government witnesses, in that the purchase price in 1944 became in 1948 the yardstick for valuation.

The Government witness, Jones, concedes that the 1944 purchase price has but remote bearing on the value of the property in 1948 when he evaluates the initial fifteen-year easement on 13.2 acres at $4,500,

plus the addition of $200,000 worth of free sand, which naturally would greatly increase the value of the property, which would then revert to the appellant.

After a careful reading of the entire record, we are convinced that the jury would not have fixed as low a price as $375 per acre were it not for the admission of evidence as to the purchase price of $4,500 in 1944.

Mr. Hulting, with all of his years of experience, frequently as a witness in many trials on behalf of the United States Government and admittedly "very conservative" (Rep. Tr. p. 191), valued the property at $1,800 per acre. It is obvious that the remote purchase evidence was prejudicial to the cause of appellant herein.

We are not unmindful of the rule that a reviewing Court will not weigh the evidence and will not disturb the verdict of the jury when there is substantial evidence to support it. However, we submit that in view of the above, the jury's verdict is without evidentiary support.

III.

THE COURT ERRED IN FINDING THAT THE PROPERTY CONDEMNED CONSISTED OF 18.27 ACRES.

A. It was stipulated at trial that there was 18.27 acres of land owned by appellant which lie west of the line of ordinary high water as of the date of taking. The appellant claimed, however, 3.65 acres that lie to the east of the high water mark.

B. The evidence on this point consisted of an original patent from the State of California to the predecessor in interest of the appellant, which patent used the "bank of the Sacramento River" as the east boundary. (See Pl. Ex. No. 1.) This exhibit was placed in evidence by the appellee.

C. Appellant put on the witness stand Harold Prescott, an engineer, who testified that he surveyed the property and searched the various records, and found the property consisted of 22.65 acres. (Rep. Tr. p. 3.)

D. Appellant placed into evidence a Sheriff's Deed (Def. Ex. D), which deed predated the patent presented by appellee. (Pl. Ex. No. 1.)

The Sheriff's Deed (Exhibit D) has for its southeastern corner the northeastern corner of the Township of Washington. (See testimony of Prescott, Rep. Tr. p. 11.)

If the appellee's position, as found by the Court is correct, then we would find, according to the description in the patent and deed that the two corners; e.g., the northeast corner of the Township of Washington would not match, and the northeast corner of the Township of Washington would lie some 160 feet to the east of the southwest corner of the Simmonds property.

As this was the only evidence submitted on the matter, the result is that the finding as to acreage is not supported by the evidence, the Court should have found that the land consisted of 22.65 acres.

CONCLUSION.

It is therefore submitted that this Court should reverse the judgment entered herein on the verdict of the jury and on the judgment of the Court and remand the cause to the District Court for a new trial.

Dated, San Francisco, California,
August 31, 1951.

Respectfully submitted,
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